APPENDIX A

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2222

NELLIE FRY
v.
DIALYSIS CLINIC, INC; DAVID CHABAL

Dialysis Clinic, Inc., Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
D.C. Civil Action No. 98-cv-01975
(Honorable Donetta W. Ambrose)

Submitted Pursuant to Third Circuit LAR 34.1(a)
May 14, 2001

Before: SCIRICA, GARTH and STAPLETON, Circuit Judges

(Filed August 30, 2001)

MEMORANDUM OPINION

SCIRICA, Circuit Judge.

This is an appeal from a denial of a motion for judgment as a matter of law in an employment discrimination case.

I.

Plaintiff Nellie Fry ("Fry") instituted the present action against the Dialysis Clinic, Inc. ("DCI") for unlawful discrimination when it terminated her employment on July 30, 1996.[1] Her direct supervisor, David Chabal, dismissed Fry after she failed to produce an original medical record on which she had made an error and for which she had substituted a rewritten record. Fry brought several claims against DCI and Chabal. After defendants' motion for summary judgment was granted and denied in part, Fry's claims were winnowed down to gender discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 ("Title VII") and age discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. ("ADEA"). The court also dismissed Chabal as a defendant. The case was then tried before a jury on June 26-30, 2000. At the close of Fry's argument, DCI moved for judgment as a matter of law under Fed. R. Civ. P. 50(a) on grounds that she had not made out a prima facie case of discrimination. The District Court denied the motion. Before the case was submitted to the jury, DCI again moved for judgment as a matter of law, reasserting is earlier argument. The court denied the motion, and the case was sent to the jury. The jury found in favor of Fry and awarded her $30,500 in back pay and $12,700 for compensatory damages. The jury also found that DCI acted

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[1] On appeal, all evidence and all factual inferences must be viewed in a light most favorable to Fry, the nonmoving party. Woodwind Estates, Ltd. v. Gretkowski, 205 F.3d 118, 122 (3d Cir. 2000).

willfully, resulting in double the back pay award as liquidated damages, for a total of $73,700. This appeal by DCI followed.
II.

In 1993, DCI hired Fry, a 50 year old woman, as the Clinical Supervisor of its dialysis clinic in Wilkinsburg, Pennsylvania. At the time of her dismissal in 1996, David Chabal was the clinic's administrator. The incident that allegedly instigated Fry's termination occurred in the beginning of July 1996 when a patient at the clinic missed three consecutive dialysis treatment appointments on July 1, July 3 and July 5. When Fry went to work on July 6, she noticed the patient had missed his appointment on the previous day. Unable to reach him at home, she marked the patient as a "no show" and entered July 5 as the date she attempted to telephone.

After a staff meeting on July 11, Chabal raised some job performance concerns with Fry, including the potential false entry on a patient's progress note made on July 5. In response, Fry admitted she mistakenly entered July 5 instead of July 6 (when she had actually been at work). Chabal then instructed Fry to correct the false entry. For this purpose, she had the appropriate nurses sign and date new entries on an updated progress note on July 11, along with the date of their original entries. On the rewritten progress note, Fry did not include an entry for July 6 when she allegedly attempted to telephone the patient.

About two weeks later, Dr. Stephen Cooksey, the clinic's medical director (but not a DCI employee), informed Chabal that the patient's original progress note was missing and that the rewritten progress note did not include Fry's entry for July 6. After speaking with the employees who had made the entries, Chabal explained the situation to David Hagewood, his

supervisor and DCI's Director of Human Resources, and asked for guidance on how to proceed. Hagewood instructed Chabal that Fry should be fired if she threw out the original progress note, because destruction of a medical record was cause for termination. Chabal and Richard Kelly, the assistant administrator, then called Fry into a meeting to discuss the whereabouts of the original progress note. What occurred at this meeting was disputed at trial. When asked about the patient's original progress note, Chabal and Kelly testified that Fry informed them she had discarded it. Fry, on the other hand, testified at trial that she never told Chabal and Kelly that she had thrown it out. Instead, she claimed to have left the original progress note, along with the rewritten record, on the charge nurse's desk for refiling. Regardless, Fry was fired after the meeting. She claims that her dismissal for failure to produce the original progress note indicates gender and/or age discrimination because a different clinic employee, Alan Shearer, a male under the age of forty, was treated more favorably under similar circumstances.

III.

The District Court had jurisdiction under 28 U.S.C. § 1331, and we have appellate jurisdiction over the court's final order under 28 U.S.C. § 1291. We exercise plenary review over an order granting or denying a motion for judgment as a matter of law, Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 88 (3d Cir. 2000); Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993). A court should only grant a motion for judgment as a matter of law if "viewing all the evidence which has been tendered and should have been admitted in the light most fav4aorable to [the] party opposing the motion, no jury could decide in that party's favor." Woodson v. Scott Paper Co., 109 F.3d 913, 919 (3d Cir. 1997) (quotation and citation omitted); Sheridan v. E.I. DuPont de

Nemours & Co., 100 F.3d 1061, 1072 (3d Cir. 1996) (en banc). "'The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party.'" Woodwind Estates, 205 F.3d at 122 (quoting Patzig v. O'Neil, 577 F.2d 841, 846 (3d Cir. 1978)). In the course of our review, it is important to recognize that "much of the record is comprised of trial testimony, that the jury had 'the unique opportunity to judge the credibility and demeanor' of the witnesses who testified at the trial, and that it reached its conclusions based in part on those observations." Woodson, 109 F.3d at 921 (quoting Quiroga v. Hasbro, Inc., 934 F.2d 497, 502 (3d Cir. 1991)).

IV.

DCI appeals the denial of its motion for judgment as a matter of law on grounds that Fry failed to establish a prima facie case of gender or age discrimination. The issue then is whether Fry presented sufficient evidence to establish a prima facie case of discrimination. For the reasons that follow, we hold that, viewing the evidence in the light most favorable to Fry, the District Court did not err in finding evidence sufficient to establish a prima facie case of discrimination.

We have held that the method for establishing either gender discrimination under Title VII or age discrimination under the ADEA follows the same framework erected by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 352 (3d Cir. 1999) (involving discrimination claim under Title VII); Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 644 (3d Cir. 1998) (involving discrimination claim under the ADEA). Under this burden-shifting analysis, a plaintiff must first establish a prima facie case of discrimination

based on sex or age. Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); Keller v. Orix Credit Alliances, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997) (en banc). If the plantiff can make out her prima facie case, the burden shifts to the defendant to produce a legitimate, non-discriminatory reason for the employee's dismissal. Pivirotto, 191 F.3d at 352 n.4. If the defendant satisfies this burden, the plaintiff must prove by a preponderance of the evidence (either circumstantially or directly) that the nondiscriminatory reason proffered by the defendant was pretextual and that unlawful discrimination was the true motivation behind the adverse employment decision. Id.

A.

DCI disputes whether Fry's discharge occurred under circumstances which give rise to an inference of discrimination because of the favorable treatment received by an alleged similarly-situated employee. At the outset, we recognize the elements of the plaintiff's prima facie case of discrimination will vary depending on the circumstances surrounding the claim.

To satisfy the burden of production required for a prima facie case of discrimination, a plaintiff must demonstrate that she (1) is a member of a protected class, i.e., was a woman or at least forty years of age (29 U.S.C. § 631(a)); (2) was performing her job satisfactorily; (3) was fired; and that (4) the circumstances surrounding her discharge give rise to an inference of discrimination. Simpson, 142 F.3d 644 n.5; Keller, 130 F.3d at 1108. The threshold for carrying this burden is low. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993); Burdine, 450 U.S. at 253 ("The burden of establishing a prim facie case of disparate treatment is not onerous."); Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 523 (3d

Cir. 1992). To establish an inference of disparate discriminatory treatment, plaintiff may show that her employer treated her less favorably than a similarly situated employee outside her protected class. Simpson, 142 F.3d at 644-45; Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994). This method of establishing employment discrimination recognizes that finding direct evidence of an employer's discriminatory motivation will be difficult. Sheridan, 100 F.3d at 1071.

Whether two employees are similarly situated presents a fact-specific inquiry for the jury. Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir. 2000); Simpson, 142 F.3d at 644-45. Generally it will require that the plaintiff and the comparator be subject to the same workplace standards and involve conduct of comparable seriousness. See McDonnell Douglas, 411 U.S. at 804; see also McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11 (1976). While there should be an "objectively identifiable basis for comparability," Cherry v. Am. Tel. & Tel. Co., 47 F.3d 225, 229 (7th Cir. 1995), between the plaintiff's and the comparator's cases, their cases need not be identical. See Conward v. Cambridge Sch. Comm., 171 F.3d 12, 20 (1st Cir. 1999) (noting "the plaintiff's case and the comparison case...need not be perfect replicas").

1.

At trial, Fry argued that Alan Shearer, a mail DCI employee under the age of forty, was a similarly situated employee who was treated more favorably for comparable improper conduct. During her tenure at DCI, Shearer committed twenty-four rule violations, some of which arguably threatened the safety of the clinic's patients. These included placing a patient in the wrong potassium bath, failing to properly calibrate a UF pump, placing a wrong sized dialyzer on a patient, falsifying records that indicated equipment had

been tested, and falsifying records that suggested equipment had been checked. In comparison, Fry incorrectly dated comments on a progress note and omitted her entry on the rewritten note. At trial, the clinic's medical director acknowledged that Shearer's violations could have resulted in harming patients while Fry's actions presented no threat to patient safely. In addition, although Fry may have lost the original progress note, she pointed out that DCI has a photocopy of the original for its files.

Defendant argues that Shearer was not similarly situated to Fry because, unlike her, he did not occupy a managerial position. DCI claims it holds managers to a higher performance standard than other employees. For this reason, it contends comparing Fry to Shearer is inapt. Fry was the Clinic Supervisor, in charge of supervising the clinic, maintaining the clinic's medical records, and enforcing the medical records policy, while Shearer was an unlicensed, hourly paid, machine technician who had no contact with patient's progress notes or medical records.

Irrespective of the similarity between their positions, DCI contends the workplace violations committed by the two employees were not comparably serious. DCI claims the integrity of its medical records is a paramount concern and the records with which Shearer worked were qualitatively less significant. Because government inspection of the clinic's medical records requires access to the original records, DCI argues this heightened scrutiny is justified. For this reason, DCI claims that Shearer's record keeping transgressions, which never involved a patient's medical records, are not comparable to Fry's alleged violation. As a result, DCI contents Shearer could not be used as a viable comparator.

In response, Fry notes that both she and Shearer were subject to the same set of workplace rules and regulations, and worked under the same supervisor. Furthermore, nothing in DCI's rules and regulations indicates that managers will be held to stricter standards than other employees.[2] Nor is there any provision in DCI's rules and regulations explaining that violations of the clinic's medical records policy will be addressed more strictly than other record keeping transgressions.[3] Moreover, even if its could be argued that Shearer was not similarly situated at the time of her dismissal, Fry notes that Shearer had previously worked as a technical supervisor who was not fired for numerous violations of the clinic's rules and regulations.

Whether these employees were similarly situated presented a material question of fact for the jury. Fry was unable to point to evidence from which a jury could reasonably infer a similarly situated male employee under the age of forty was treated more favorably. See Simpson, 142 F.3d at 647. We believe a rational jury could find that everyone under DCI's workplace regulations was subject to the same standards regardless of their employment status. In other words, the rules could apply equally to all employees regardless of their position. A jury could also rationally conclude that Shearer's numerous and varied rules violations were comparably serious

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[2] The stated purpose of DCI's rules and regulations is "[t]o develop guidelines regarding employee discipline and discharge to assure fair, equitable and consistent treatment of *all employees*." (emphasis added). App. at 158.

[3] As grounds for immediate termination, in fact, DCI's rules end regulations state, "Falsifying any facility records which includes but [i]s not limited to wrongfully documenting that any procedure, machine checks, vital signs checks, etc. were completed by were actually omitt[ed]." App. at 158.

to Fry's infraction. We hold the court's denial of defendant's motion for judgement as a matter of law for failure to establish a prima facie case of discrimination was proper. [4]

B.

If a plaintiff establishes her prima facie case of discrimination, the burden shifts to defendant to "produce some evidence of a legitimate, nondiscriminatory reason for the adverse employment action." Pivirotto, 191 F.3d at 352 n.4. If the defendant satisfies this burden, plaintiff can survive

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[4] Because Fry was replaced by an older women, DCI also argues a prima facie case of discrimination cannot be made. We disagree.

The discrimination laws focus on protecting individuals, rather than a protected class us a whole, and an employer "may not escape liability for discriminating against a given employee on the basis of [sex or age] simply because it can prove it treated other members of the employee's group favorably." Graham, 230 F.3d at 43 (citing Connecticut v. Teal, 457 U.S. 444, 453-55 (1982)). A "plaintiff's inability to prove that she was replaced by someone outside her class is not necessarily inconsistent with her demonstrating that the employer treated her 'less favorably than others because of [her]...sex....'" Pivirotto, 191 F.3d at 353 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 576, 577 (1978)). As a result, we have held that "it is inconsistent with Title VII to require a plaintiff to prove that she was replaced by someone outside her class in order to make out a prima facie case." Graham, 230 F.3d at 355. Under the ADEA, the Supreme Court has also determined that replacement by someone younger is unnecessary to establish a prima facie case of discrimination. O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996) ("The fact that one person is the protected class has lost out to another person in the protected class is thus irrelevant, so long as the [s]he lost out *because of [h]er age*"). This is true because a woman may still be treated differently from similarly situated younger, male employees even when she is replaced by a woman. Pivirotto, 191 F.3d at 353-54. Neither statute requires plaintiff to be replaced by someone outside the protected class to establish a prima facie case of discrimination.

judgment as a matter of law by submitting evidence "from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Fuentes, 32 F.3d at 764. To accomplish this, a plaintiff "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them 'unworthy of credence,'" Id. at 765 (quoting Ezold, 983 F.2d at 531). But the jury is allowed to return a verdict in plaintiff's favor if it does not believe the employer's proffered reason for discharge. Hicks, 509 U.S. at 511; see also Smith v. Borough of Wilkinsburg, 147 F.3d 272 (3d Cir. 1998). Put simply, a plaintiff must prove by a preponderance of the evidence that the stated reason was pretextual and that the employment action was caused by unlawful discrimination. Pivirotto, 191 F.3d at 352 n.4.

Even if Fry made out her prima facie case, DCI contends she did not present sufficient evidence to demonstrate that her dismissal for failure to produce the original progress note was pretextual. For this contention, DCI maintains that David Hagewood, the Director of Human Resources, was unaware of Fry's sex or age when he told Chabal to dismiss her is she could not locate the original progress note. For her part, Fry denies any responsibility for the loss of the original progress note and claims its importance is mitigated because DCI still has a photocopy. Under these facts, we hold the jury could have disbelieved defendant's statement that Fry would have been fired for her actions absent discrimination.

Fry also introduced evidence of conduct by Chabal that arguably revealed gender and age bias. This evidence included testimony by Fry as well as other DCI employees that involved

inappropriate sexual comments and age remarks uttered by Chabal. DCI contends Chabal's comments and actions are immaterial, since he was not the person ultimately responsible for dismissing Fry. But the trial record demonstrates that Chabal participated in the termination decision to such an extent that we cannot say he was "outside the chain of decsionmakers who had authority to hire and fire plaintiff." Woodson, 109 F.3d at 922 (quoting Gomez v. Allegheny Health Serv., Inc., 71 F.3d 1079, 1085 (3d Cir. 1995)). Even if Chabal was not the final voice on employment decisions at DCI, he played a critical role in the decision process because of his authority to raise personnel issues with Hagewood. We hold the jury could have rationally believed that invidious discrimination was the motivating force behind Fry's dismissal.

Lastly, we recognize that demonstrating that a similarly situated employee who belongs to a nonprotected group received more favorable treatment can also serve as evidence that the employer's proffered legitimate, nondiscriminatory reason for the adverse job action was a pretext for gender bias or age discrimination. Because a jury could rationally conclude there was disparate treatment in DCI's termination of Fry when compared to a similarly situated employee, it could also rationally find that DCI's proffer of a nondiscriminatory reason for Fry's dismissal was pretextual.

V.

DCI contends the District Court improperly charged the jury with a mixed-motive discrimination instruction. We disagree.

We review jury instructions in context under an abuse of discretion standard. Pivirotto, 191 F.3d at 350. However, "our review is plenary when the question is whether the

instruction misstates the law." Walden v. Georgia-Pacific Corp., 126 F.3d 506, 513 (3d Cir. 1997).

If a timely objection has not been lodged, "we review for plain error and we will reverse only if the trial court committed error that was fundamental and highly prejudicial, such that the instructions failed to provide the jury with adequate guidance, and the District Court's refusal to consider the issue would result in a miscarriage of justice." Alexander v. Riga, 208 F.3d 419, 426 (3d Cir. 2000). This discretionary review should only be exercised sparingly. Simmons v. City of Philadelphia, 947 F.2 1042, 1078 (3d Cir. 1991).

In this case, DCI did not object to the trial court's jury instruction. Moreover, the District Court did not commit error, let alone plain error. The court properly instructed the jury that if Fry established her prima facie case of discrimination and DCI offered a nondiscriminatory reason for the adverse employment action, Fry had the burden of demonstrating by a preponderance of the evidence that the employer's alleged nondiscriminatory reason for her termination was pretextual. This was the proper instruction.

VI.

DCI also claims the District Court abused its discretion when it (1) admitted testimony by clinic employees involving sexual and age related remarks made by Chabal; (2) admitted evidence of Shearer's disciplinary record; and (3) denied Hagewood from testifying about comments made to him in the course of investigating Fry's allegations.

We review the District Court's decision to admit or exclude evidence for abuse of discretion. Becker v. ARCO Chemical Co., 207 F.3d 176, 180-01 (3d Cir. 2000) (collecting

cases). DCI only briefly touches on these claims. But our review of the record demonstrates the District Court exercised its sound discretion in finding the probative value of the remarks allegedly made by Chabal outweighed their prejudicial effect. Moreover, Hagewood's third-party testimony constitutes hearsay to which there is no applicable exception. We see no abuse of discretion.

VII.

For the foregoing reasons, we will affirm the judgment of the District Court.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Anthony J. Scirica
Circuit Judge

DATED:

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon Nicholas J. Evashavik, 520 Grant Building, 310 Grant Street, Pittsburgh, PA 15219 by U.S. Mail, postage prepaid, this 13th of September, 2001.

/s/Thomas J. Bender

Thomas J. Bender, Jr.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NELLIE A. FRY,	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	Civil Action
	)	No. 98-1975
DIALYSIS CLINIC, INC. and DAVID CHABAL,	)	
	)	
	)	
Defendants.	)	

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict upon answers to special written interrogatories.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment entered in favor of Plaintiff, Nellie A. Fry and against Defendant, Dialysis Clinic, Inc. in the amount of $73,700.00

Judgment is hereby entered in accordance with the above special verdict.

APPROVED:_____
UNITED STATES DISTRICT JUDGE

June 30, 2000
Date

_____
Clerk

/s/Linda C. Krings
(By) Deputy Clerk

Robert W. Pritchard
Buchanan Ingersoll
301 Grant Street
One Oxford Centre, 20th Floor
Pittsburgh, PA 15219

CLERK'S OFFICE
United States District Court
for Western Pennsylvania

Civil Action No. 2:98-cv-01975
FRY v. DIALYSIS CLINIC, INC

There was entered on the docket June 30, 2000, an (judgment) entered in favor of pltf and against Dialysis Clinic, Inc.

James A. Drach, CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NELLIE A. FRY,	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	Civil Action
	)	No. 98-1975
	)	
DIALYSIS CLINIC, INC. and DAVID CHABAL,	)	
	)	
	)	
Defendants.	)	

AMBROSE, District Judge.

OPINION
and
ORDER OF COURT

Pending before the Court is the Motion for Summary Judgment of Defendants Dialysis Clinic, Inc. ("DCI") and David Chabal ("Chabal") on the claims brought against them by Plaintiff Nellie Fry ("Plaintiff" or 'Fry'). For the reasons set forth below, the Defendants Motion is granted as to the plaintiff's claims for retaliatory discharge, sexual harassment, defamation, negligence, and breach of contract against both Defendants DCI and Chabal, granted as to Plaintiff's claims for discriminatory discharge under the ADEA and Title VII as to Defendant Chabal, and denied as to Plaintiff's claims for discriminatory discharge under the ADEA and Title VII as to Defendant DCI.

STANDARD OF REVIEW

Summary judgment may only be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. p. 56(c). Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In considering a motion for summary judgment, this Court must examine the facts in a light most favorable to the party opposing the motion. International Raw Materials. Ltd. v. Stauffer Chemical Co., 898 F.2d 946, 949 (3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence creates no genuine issue of material fact. Chipollini v. Spencer Gifts. Inc., 814 F.2d 893, 896 (3d dr. 1987). The dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is material when it might affect the outcome of the suit under the governing law. Id. Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. Celotex, 477 U.S. at 322.

LEGAL ANALYSIS

Defendants move for summary judgment on the following claims against them by Plaintiff: (1) sex and age discrimination in her discharge; (2) retaliatory discharge; (3)

sexual harassment; (4) defamation; (5) negligent hiring and/or retention of Chabal, the supervisor who allegedly harassed her; (6) negligent approval of Plaintiff's discharge while being aware of unlawful motives; and (7) breach of contract created by her employee handbook.

Preliminarily, in her Brief in Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Opposition brief"), Plaintiff only discusses her discriminatory discharge claims under Title VII and the ADEA and does not dispute any of the Defendants' contentions with respect to the rest of Plaintiff's claims. Indeed, the conclusion to Plaintiff's Opposition Brief reads "[f]or the foregoing reasons, defendant's motion for summary judgment for plaintiff's claims of discriminatory discharge under Title VII and the ADEA must be not [sic] be denied." Plaintiff's Opposition Brief, p. 17. Accordingly, I read Plaintiff's failure to provide any substantive opposition to Defendant's Motion for Summary Judgment with respect to any claims for sexual harassment, retaliatory discharge, breach of contract, negligence and defamation to be an acknowledgment that summary judgment is properly granted as to said claims and therefore, grant Defendant's motion for summary judgment as to Plaintiff's claims against the Defendants for sexual harassment, retaliatory discharge, breach of contract, negligence and defamation with prejudice.

Having so held, I turn next to Defendants' Motion with respect to Plaintiff's gender and age discrimination claims. Fry claims that she was terminated from her employment on July 30, 1996, by Chabal after she was unable to produce an original medical record on which she had made an error and for which she had substituted a rewritten record. Plaintiff contends that another DCI employee, Alan Shearer ("Shearer"), a male under forty (40) years of age, was treated more favorably than she. First, with respect to these claims as against Chabal individually, Defendants argue that there cannot be individual

liability against Defendant Chabal because Title VII and the ADEA do not provide for individual liability. I agree. It is well settled in this circuit that there is no individual liability under Title VII. See Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1077 (3d dir. 1996), cert. den'd, 521 U.s. 1129 (1997). Moreover, while the United States Court of Appeals for the Third Circuit has not addressed the issue of individual liability under the ADEA, because the ADEA and Title VII statutes define the term "employer" similarly and share the same basic purpose, i.e. to prohibit discrimination in employment against members of certain class, the district courts within this circuit have concluded that for the same reasons that there is no individual liability under Title VII, there can be no individual liability under the ADEA. See, e.g., Kohn v. AT&T Corp., 58 F. Supp.2d 393, 421 (D.N.J. 19pp); Moore v. Acme Corrugated Box Co., Inc., 1997 WL 535906, *2 (E.D. Pa. Aug. 4, 1997). See also Stults v. Conoco. Inc., 76 F.3d 651, 655 (5th Cir. 1996); Smith v. Lomax, 45 F.3d 402, 403 n. 4 (11th Cir. 1995); Birkberk v. Marvel Lighting Corp., 30 F.3d 507, 510-11 (4th Cir.1994), cert. den'd, 513 U.S. 1058 (1994); Miller v. Maxwell's Intern. Inc., 991 F.2d 583, 587-88 (9th Cir. 1993), cert. den'd, 510 U.S. 1109 (1994); Sabo[illegible] v. Ohio Dept. of Educ., 1998 WL 57337, *1(6th Cir. [illegible]o. 2, 1998). Accordingly, the Defendants' Motion for Summary Judgment on the ADEA and Title VII claims brought by Plaintiff against Defendant Chabal individually is granted and said claims dismissed with prejudice.

Concerning Plaintiff's discriminatory discharge claims in general (i.e. both as against DCI and Chabal), Defendants first argue that Plaintiff cannot establish a prima facie case of discriminatory discharge under either Title VII or the ADEA because Plaintiffs discriminatory discharge claims are premised upon her being treated differently than fellow employee Shearer, a male DCI employee who worked at the same DCI clinic as Plaintiff, DCI-Wilkinsburg, and who was under the

age of forty (40). Defendants claim that Shearer was not a person similarly situated to Plaintiff and was not treated any differently than Plaintiff.

More specifically, Defendants argue that Plaintiff, a licensed nurse, was a licensed professional employee and the Clinical Supervisor at the DCI-Wilkinsburg facility and was at first given the opportunity to fix the medical record at issue when she explained to Chabal that she had simply entered the wrong date for when she contacted a patient who had failed to appear for a dialysis treatment. Defendants contend that plaintiff was ultimately terminated for losing or destroying an original medical record. On the other hand, Shearer, according to Defendants, was not, as was Plaintiff, a licensed nurse nor a supervisor, but was a former hourly technician at DCI, who had made a false entry on a water treatment testing log, which is not a medical record, and was disciplined, but not fired.

In response, Plaintiff first contends that she and Shearer are persons similarly situated and Shearer was treated differently than Plaintiff. Specifically, Plaintiff contends that Fry is comparable to Shearer because: (1) ultimately Chabal was in charge of all employees at the DCI-Wilkinsburg clinic, including Fry and Shearer, and all discipline of these employees was subject to Chabal's approval; (2) it is irrelevant that Plaintiff was a licensed professional and Shearer was not a licensed professional; (3) all DCI employees were subject to the same set of rules and regulations; (4) Plaintiff's subjective belief that she could be held to a higher standard is meaningless because DCI, not Fry, promulgated and published all applicable rules and regulations; and (5) the acts of destroying an original medical record and of falsifying medical records are comparable instances of misconduct since DCI rules and regulations categorize as the basis for immediate termination "[f]alsifying any facility records which includes... but not limited to wrongfully documenting that any procedure,

machine checks, vital sign checks, etc. were completed but were actually omitted," (see Exhibit C to Complaint). According to Plaintiff, that is what Shearer did when he marked down that he had performed a water test on July 29,1996, when he had not actually completed such a test on that date but instead, performed the test on July 30, 1996 and then wrote down the results for both July 29, 1996 and July 30, 1996.

Concerning whether Plaintiff and Shearer were similarly situated, I find first that simply because Plaintiff was a licensed nurse and Shearer an hourly-paid technician does not negate the possibility that the two individuals were similarly situated. Moreover, I find that because under the facts of this case viewed in a light most favorable to Plaintiff, all DCI employees, both supervisory and non-supervisory, were subject to the same rules and regulations, there is a genuine factual issue as to whether Plaintiff and Shearer were similarly situated.

Thus, the next query is whether Plaintiff and Shearer engaged in comparable forms of misconduct and yet Shearer was treated more favorably. A review of DCI's rules and regulations applicable to both Plaintiff and Shearer shows that among the grounds for immediate termination were "[f]alsifying any facility records which includes but not limited to wrongfully documenting that any procedure, machine checks, vital signs checks, etc. were completed but were actually omitted." A note dated October 23, 1995 from Shearer's personnel file states "while performing pump calibration I found that Alan Shearer did not perform PrU3 [?] calibrations as he checked off on PM [?] check list. I corrected Cal and performed rest of C3 PM [?]." A note from Shearer's personnel file dated July 30, 1996 states: "[t]his document serves as a second written warning regarding work performance for Alan Shearer, a machine reuse technician at DCI Wilkinsburg. Alan has violated DCI's policy regarding

falsifying documentation and jeopardizing patient safety. On 7-29-96 Alan failed to test the water treatment system and record the result in the water treatment system log. It was discovered by me on 7-29-96 and a copy of the log was made. On 7-30-96 Alan did the testing and logged the results, along with filling in falsified information for 7-29-96 (see attached forms)." Based upon this conduct by Shearer, I find that there is a genuine issue of material fact as to whether Shearer was treated more favorably than was Plaintiff.

Alternatively, Defendants argue that even if Fry can state a prima facie case of discriminatory discharge, she cannot overcome the legitimate non-discriminatory reason proffered by DCI for her termination. DCI's legitimate non-discriminatory reason for Plaintiff's termination is that Plaintiff either lost or destroyed an original medical record. In support of this position, DCI contends that Plaintiff cannot establish pretext because any remarks concerning Plaintiff's gender or age were isolated stray remarks by Chabal which were both unrelated to Plaintiff's discharge and were not made by the decision maker. DCI also argues that Plaintiff has no explanation for why, if Chabal was prejudiced against older employees or females, the replacement he hired for Plaintiff was a female who was older than Plaintiff, or why Chabal did not terminate Plaintiff on July 11,1996 when he confronted her with the false entry made for July 5,1996, but rather, accepted Plaintiff's explanation and provided her the opportunity to correct her alleged mistake. Id. at p. 13.

In response, Plaintiff first contends that she can demonstrate that DCI's stated reason for terminating her was pretextual through direct evidence of bias such as discriminatory statements and admissions. Plaintiff's Supporting Brief, p. 14. Specifically, Plaintiff argues that Chabal was her supervisor and in charge of the DCI-Wilkinsburg clinic and that he clearly was a

manager/decision maker and made statements that demonstrated an unequivocal bias. Plaintiff then cites to the following comments made by Chabal:

> Chabal stated that if other female employees had big brown hair or a brown wig and big breasts they would get along better at their clinic or go far at DCI. Chabal repeatedly referred to his "appendage", meaning his penis. Chabal often told inappropriate sexual jokes or made inappropriate comments. Chabal made other sexual comments to female employees that were known to Fry. Chabal regularly referred to Fry as old or made age-related comments. On another occasion Chabal approached a female DCI employee from behind her and began touching the back of her neck.

Plaintiffs Opposition Brief, p. 15. Alternatively, Plaintiff contends that there is evidence of record from which one could disbelieve DCI's proffered reason for Plaintiff's termination because: (1) Plaintiff knew at the time of the incidents in question that an original medical document is a significant document in the medical profession; (2) Plaintiff knew that Chabal and DCI were aware of her charting error; (3) an exact duplicate of the original existed; and (4) Plaintiff did not throw away the original document, but rather, she returned the progress note to the charge nurse's desk which was in compliance with DCI-Wilkinsburg procedure.

"To defeat a summary judgment motion based on a defendant's proffer of non-discriminatory reasons, a plaintiff who has made a prima facie showing of discrimination need point to some evidence, direct or circumstantial, from which a factfinder could reasonably either: (1) disbelieve the employer's

articulated legitimate reason; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 330-31 (3d Cir. 1995), citing, Fuentes v. Perskie, 32 F.3d 759, 763-64 (3d Cir. 1994). Further, "[t]o discredit the employer's proffered reason, . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a factfinder could rationally find them 'unworthy of credence'." Fuentes, 32 F.3d at 765, quoting, Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1992), cert. den'd, 510 U.S. 806 (1993) (internal citations omitted).

After careful consideration of the record evidence, I find that viewing the facts of record in a light most favorable to Plaintiff, including, but not limited to, the statements made by Chabal, Plaintiff's supervisor, to Plaintiff related to her age and gender and the facts that support Plaintiff's prima facie case, there is a genuine issue of material fact as to whether a discriminatory motive was more likely than not a motivating reason behind DCI's action. Accordingly, Defendants' Motion for summary Judgment on Plaintiff's discriminatory discharge claims under the ADEA and Title VII is denied as to Defendant DCI.

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DATE FILED: JANUARY 18, 2000

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NELLIE A. FRY,	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	Civil Action
	)	No. 98-1975
	)	
DIALYSIS CLINIC, INC. and DAVID CHABAL,	)	
	)	
	)	
Defendants.	)	

AMBROSE, District Judge.

ORDER OF COURT

AND NOW, this 18th day of January, 2000, after careful consideration and for the reasons set forth in the Opinion accompanying this Order, it is **ORDERED** that the Defendants' Motion for Summary Judgment (Docket No. 8) is **GRANTED** as to the Plaintiff's claims for retaliatory discharge, sexual harassment, defamation, negligence, and breach of contract against both Defendants DCI and Chabal; **GRANTED** as to Plaintiff's claims for discriminatory discharge under the ADEA and Title VII as to Defendant Chabal; and **DENIED** as to Plaintiff's claims for discriminatory discharge under the ADEA and Title VII as to Defendant DCI.

BY THE COURT:

/s/Donetta W. Ambrose

Donetta W. Ambrose,
U.S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD COURT

No. 00-2222

NELLIE FRY

v.

DIALYSIS CLINIC, INC; DAVID CHABAL

Dialysis Clinic, Inc., Appellant

(D.C. Civ. No. 98-cv-01975)

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH,
McKEE, BARRY, AMBRO, FUENTES, GARTH* and
STAPLETON*, Circuit Judges

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* As to panel rehearing only.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/Anthony J. Scirica
Circuit Judge

Dated: October 16, 2001

APPENDIX E

The relevant portion of 29 U.S.C. § 623 et. seq. provides:

It shall be an unlawful for an employer -

> (1) to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623 (a)(1).

The relevant portion of 42 U.S.C. § 2000e et. seq. provides:

It shall be an unlawful employment practice for an employer -

> (1) to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1).